

**2501 DEFAMATION: PRIVATE INDIVIDUAL VERSUS PRIVATE INDIVIDUAL, NO PRIVILEGE**

Question 3 (2) asks whether the statement made (published) by (defendant) was defamatory.

A defamatory statement is one which: (1) is false, (2) is communicated (by speech) (by conduct) (in writing) to a third person, and (3) tends so to harm the reputation of another as to lower the person in the estimation of the community or deters others from associating or dealing with the person. If you find that the statement was substantially true, then the statement is not false. Slight inaccuracies of expression do not mean that the statement is false if it is true in substance.<sup>1</sup>

The action of defamation is based upon the principle that a person's reputation and good name is of great value. Once such reputation and good name have been damaged by statements of another person, restoration is virtually impossible.

It is not necessary that the defamatory statement be communicated to a large or even a substantial number of persons. It is enough if it is communicated to a single person other than the one defamed. Nor is it necessary that the statement be made (published) with the intention to defame, for the intention of the speaker (author) is not material.

In determining whether (defendant) made or published a defamatory statement, you should consider the whole context of the communication, giving the particular words of defamation their natural and ordinary meaning.

(Plaintiff) has the burden of proof to satisfy you by the greater weight of the credible evidence, to a reasonable certainty, that the statement made (published) by (defendant) was defamatory.

(As to Question 4 (3), the damage question, give COMPENSATORY DAMAGES, WIS JI-CIVIL 2516, and BURDEN OF PROOF, ORDINARY, WIS JI-CIVIL 200.)

(As to Question 5 (4), express malice, give EXPRESS MALICE, WIS JI-CIVIL 2513.)

(As to Question 6 (5), punitive damages, give PUNITIVE DAMAGES, WIS JI-CIVIL 2520.)

(As to Questions 5 (4) and 6 (5), give BURDEN OF PROOF, MIDDLE, WIS JI-CIVIL 205.)

**SPECIAL VERDICT - TRUTH OF THE STATEMENT RAISED AS A DEFENSE:**

Question 1: Did (defendant) say (insert alleged statement, e.g., plaintiff is a thief)?

Answer: \_\_\_\_\_

Yes or No

Question 2: If you answered “yes” to Question 1, then answer this question: Was such statement substantially true?

Answer: \_\_\_\_\_

Yes or No

[Note: In 1986, the United States Supreme Court held that a private-figure plaintiff who is suing a media defendant for publishing a defamatory statement of public concern cannot recover damages without showing that the statement at issue is false. Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, (1986). The holding

in Philadelphia Newspapers, Inc. appeared to be in contrast, at least in cases involving a media defendant, to Wisconsin common law, which placed the burden that the statement was true on the defendant as an affirmative defense. Denny v. Mertz, 106 Wis.2d 636, 661 n. 35, 318 N.W.2d 141 (1982). The resulting uncertainty as to whether Denny v. Mertz applied to defamation actions involving non-media defendants was resolved in Laughland v. Beckett, 2015 WI App 70, 365 Wis. 2d 148, ¶¶23, 26. There, the Court held that when the defendant is not a media defendant, it is the defendant's burden to establish that the allegedly defamatory statement was substantially true. Id. at ¶¶23, 26. Philadelphia Newspapers, Inc. v. Hepps, supra, involved a constitutional conditional privilege.]

Question 3: If you answered “no” to Question 2, then answer this question: Was such statement defamatory?

Answer: \_\_\_\_\_

Yes or No

Question 4: If you answered “yes” to Question 3, then answer this question: What sum of money will fairly and reasonably compensate (plaintiff) because of such defamatory statement?

Answer: \$ \_\_\_\_\_

Question 5: If you answered “yes” to Question 3, then answer this question: Did (defendant) act with express malice in making (publishing) the defamatory statement?

Answer: \_\_\_\_\_

Yes or No

Question 6: If you answered “yes” to Question 5, then answer this question: What sum of money, if any, do you assess against (defendant) for punitive damages?

Answer: \$ \_\_\_\_\_

**SPECIAL VERDICT - TRUTH OF THE STATEMENT NOT RAISED AS A DEFENSE:**

Question 1: Did (defendant) say (insert alleged statement, e.g., plaintiff is a thief)?

Answer: \_\_\_\_\_

Yes or No

Question 2: If you answered “yes” to Question 1, then answer this question:  
Was such statement defamatory?

Answer: \_\_\_\_\_

Yes or No

Question 3: If you answered “yes” to Question 2, then answer this question:  
What sum of money will fairly and reasonably compensate  
(plaintiff) because of such defamatory statement?

Answer: \$\_\_\_\_\_

Question 4: If you answered “yes” to Question 2, then answer this question: Did  
(defendant) act with express malice in making (publishing) the  
defamatory statement?

Answer: \_\_\_\_\_

Yes or No

Question 5: If you answered “yes” to Question 4, then answer this question: What  
sum of money, if any, do you assess against (defendant) for punitive  
damages?

Answer: \$\_\_\_\_\_

**NOTES**

1. “By definition, a defamatory statement must be false.” Anderson v. Hebert, 2011 WI App 56, ¶14, 332 Wis. 2d 432, 798 N.W.2d 275. Therefore, the truth of a communication is an absolute defense to a defamation claim. Id. Further, the communication need not “be true in every particular. All that is required is that the statement be substantially true.” Id. It is the defendant’s burden in these circumstances to establish that the statement was substantially true. See, e.g., Laughland v. Beckett, 2015 WI App 70, 365 Wis. 2d 148, ¶¶23, 26, 870 N.W.2d 466.

**COMMENT**

This instruction was originally approved in 1986 and revised in 1991. The comment was revised in 1987. This instruction was revised in 2002 to conform the language regarding the burden of proof to the Committee’s 2002 revisions to Wis. JI-Civil 200 and 205, the instructions on the civil burdens of proof. See Wis. JI-Civil 200, Comment. This revision was approved by the Committee in September 2022.

Denny v. Mertz, 106 Wis.2d 636, 658, 318 N.W.2d 141 (1982); Martin v. Outboard Marine Corp. 15 Wis.2d 452, 462-63, 113 N.W.2d 135 (1962); Restatement, Second, Torts §§ 577, 558, 559 (1977).

See also Law Note, Wis JI-Civil 2500.

In all areas not protected by first amendment constitutional considerations, the burden of proof is the ordinary civil burden. Calero v. Del Chemical Corp. 68 Wis.2d 487, 500, 228 N.W.2d 737 (1975).